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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

WALTER J. MILLER,
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Robert E. Albright, on behalf of Walter J. Miller, prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Sixth Circuit, entered on March 22, 1957, affirming a judgment of the United States District Court for the Northern District of Ohio, Western Division, in favor of the United States of America (plaintiff in the District Court) an action for the collection of penalties under the Agricultural Adjustment Act of 1938, as amended, (7 U. S. C. Section 1281, et seq., 52 Stat. 31, et seq.) granting unto the United States of America, a judgment in the amount of $302.40 with costs.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 242 F. Rep. 2d 392, and appears in the appendix, infra, pp. ..... The United States District Court for the Northern District of Ohio, Western Division is not recorded. The court did not render an opinion, but only an order sustaining a motion for summary judgment and granting unto the United States Government a judgment in the amount of $302.40 together with the costs of the action. It appears in the appellants' appendix filed in the United States Court of Appeals for the Sixth Circuit (page 15a, appellant's appendix).

JURISDICTION

The order of the court below (appendix infra, p. 14) was entered on March 22, 1957. The Supreme Court of the United States, upon consideration of the application of counsel for the petitioner, gave an order extending the time to file the petition for writ of certiorari to July 20, 1957. The jurisdiction of the court is invoked under 38 U.S.C.A. 1254.

QUESTIONS PRESENTED

The petitioner was sued for a wheat penalty by the United States of America for excess wheat upon his farm under the provisions of 7 U.S.C.A. 1281, et seq., 52 Stat. 31, et seq. The complaint is set forth in pages 2a, 3a, 4a, 5a, 6a of the appellant's appendix. The petitioner filed an answer alleging certain affirmative defenses and a request for a trial by jury (pages 6a, 7a, 8a, appellant's appendix).

The complainant moved and was granted a summary judgment. The questions presented in this petition are:

1. Is a wheat penalty, as such, when sought by court proceedings a "forfeiture of property" as set forth in Rule 81 of the Federal Rules of Civil Procedure?

2. Does a defendant in an action for a wheat penalty have a right to a jury trial when his answers set forth affirmative defenses?

3. Is the Agricultural Adjustment Act of 1938, as amended (7 U.S.C.A. 1281, et seq., 52 Stat. 31, et seq.), applicable to a farmer who has not been nor has ever been, in regards to wheat, engaged in interstate commerce or affecting the same, either directly or indirectly and who has never accepted any benefits either directly or indirectly under the act?

4. Is the application of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C.A. 1281, et seq., 52 Stat. 31, et seq.), to a farmer who is not engaged in interstate or foreign commerce or who does not affect either directly or indirectly, interstate or foreign commerce in regards to wheat, a denial of due process of law?

STATUTES INVOLVED.

The Agricultural Adjustment Act of 1938, as amended (7 U.S.C.A. 1281, et seq., 52 Stat. 31, et seq.), provides in pertinent part:

"7 U.S.C.A. Sec. 1340

"(1) The farm marketing quota under the Act for any crop of wheat shall be the actual production of the acreage planted to wheat on the farm, less the normal production or the actual production, whichever is the smaller, of that acreage planted to wheat on the farm which is in excess of the farm acreage allotment

for wheat. The farm marketing quota under the Act for any crop of corn shall be the actual production of the acreage planted to corn on the farm, less the normal production or the actual production, whichever is the smaller, of that acreage planted to corn on the farm which is in excess of the farm acreage allotment for corn.

"The normal production, or actual production, whichever is the smaller, of such excess average is hereinafter called the 'farm marketing excess' of corn or wheat, as the case may be. For the purposes of this resolution, 'actual production' of any number of acres of corn or wheat on a farm means the actual average yield of corn or wheat, as the case may be, for the farm times such number of acres.

"(2) During any marketing year for which quotas are in effect, the producer shall be subject to a penalty on the farm marketing excess of corn and wheat. The rate of the penalty on wheat shall be 45 per centum of the parity price per bushel of wheat as of May 1 of the calendar year in which the crop is harvested.

"(3) The farm marketing excess for corn and wheat shall be regarded as available for marketing, and the penalty and the storage amount or amounts to be delivered to the Secretary of the commodity shall be computed upon the normal production of the excess acreage. Where, upon the application of the producer for an adjustment of penalty or of storage, it is shown to the satisfaction of the Secretary that the actual production of the excess acreage is less than the normal production thereof, the difference between the amount of the penalty or storage as computed upon the basis of normal production and as computed upon the basis of actual production shall be returned to or

allowed the producer. The Secretary shall issue regulations under which the farm marketing excess of the commodity for the farm may be stored or delivered to him. Upon failure to store or deliver to the Secretary the farm marketing excess within such time as may be determined under regulations prescribed by the Secretary, the penalty computed as aforesaid shall be paid by the producer. Any corn or wheat delivered to the Secretary hereunder shall become the property of the United States and shall be disposed of by the Secretary for relief purposes in the United States or in foreign countries or in such other manner as he shall determine will divert it from the normal channels of trade and commerce.

"(4) Until the producers on any farm store, deliver to the Secretary, or pay the penalty on, the farm marketing excess of any crop of corn or wheat, the entire crop of corn or wheat, as the case may be, produced on the farm shall be subject to a lien in favor of the United States for the amount of the penalty.

"(5) The penalty upon corn or wheat stored shall be paid by the producer at the time, and to the extent, of any depletion in the amount of the commodity so stored, except depletion resulting from some cause beyond the control of the producer.

"(6) Whenever the planted acreage of the then current crop of corn or wheat on any farm is less than the farm acreage allotment for such commodity, the total amount of the commodity from any previous crops required to be stored in order to postpone or avoid payment of penalty shall be reduced by that amount which is equal to the normal production of the number of acres by which the farm acreage allotment exceeds

the planted acreage. The provisions of section 326 (b) and (c) of the Act shall be applicable also to wheat.

"(7) A farm marketing quota on corn or wheat shall not be applicable to any farm on which the acreage planted to the commodity is not in excess of fifteen acres. The marketing penalty on corn or wheat shall not be applicable to any farm which, under the terms of the then current agricultural conservation program formulated under sections 7 to 17, inclusive, of the Soil Conservation and Domestic Allotment Act, is classified as a nonallotment farm if the acreage of the commodity harvested on such nonallotment farm is not in excess of fifteen acres or the acreage allotment for the farm, whichever is larger. If the acreage of the commodity harvested on any such nonallotment farm is in excess of fifteen acres and in excess of such acreage allotment, the normal production or the actual production, whichever is the smaller, of the acreage harvested in excess of fifteen acres or such acreage allotment, whichever is larger, shall be taken as the farm marketing excess and shall be subject to penalty: Provided, That there shall be no penalty on wheat harvested on any such nonallotment farm from which no wheat is sold if the acreage of wheat harvested on such farm does not exceed such acreage per family living thereon as may be used for home consumption without reducing the payment with respect to the farm under the then current agricultural conservation program: Provided further, That for the marketing year beginning in 1941, there shall be no marketing penalty on wheat with respect to any such nonallotment farm if the acreage of wheat harvested on the farm is not in excess of the usual acreage determined for the farm under the 1941 agricultural conservation program and the county committee determines, in ac-

cordance with regulations of the Secretary, that there will not be marketed an amount of wheat in excess of the 1941 farm marketing quota.

"(8) Until the farm marketing excess of corn or wheat, as the case may be, is stored or delivered to the Secretary or the penalty thereon is paid, each bushel of the commodity produced on the farm which is sold by the producer to any person within the United States shall be subject to the penalty as specified in paragraph (2) of this resolution. Such penalty shall be paid by the buyer, who may deduct an amount equivalent to the penalty from the price paid to the producer.

"7 U.S.C.A. 1375

"(a) The Secretary shall provide by regulations for the identification, wherever necessary, of corn, wheat, cotton, rice, peanuts, or tobacco so as to afford aid in discovering and identifying such amounts of the commodities as are subject to and such amounts thereof as are not subject to marketing restrictions in effect under this title. (7 U.S.C.A. 1375(a)

"(b) The Secretary shall prescribe such regulations as are necessary for the enforcement of this title." (7 U.S.C.A. 1375(b)

"7 U.S.C.A. 1376

"The several district courts of the United States are hereby vested with jurisdiction specifically to enforce the provisions of this title. If and when the Secretary shall so request, it shall be the duty of the several district attorneys in their respective districts, under the direction of the Attorney General, to institute proceeding to collect the penalties provided in this title. The remedies and penalties provided for herein shall be

in addition to, and not exclusive of any of the remedies or penalties under existing law. (7 U.S.C.A. 1376)."

CONSTITUTIONAL PROVISIONS

Article I, Section 8. The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

AMENDMENT (V)

Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (VII)

Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

BASIS FOR FEDERAL JURISDICTION OF THE FEDERAL DISTRICT COURT

The jurisdiction of the United States District Court of the United States for the Northern District of Ohio over this proceedings is given under the provisions of Section 376 of the Act (7 U.S.C.A. 1376), and title 28 United States Code Section 1345.

STATEMENT OF CASE

This petition seeks a review upon the constitutionality of the Agricultural Adjustment Act of 1938 as amended, in regards to the collection of penalties, procedure for collection of penalties and the right of jury trial to determine affirmative defenses; and the denial of due process in regards to such action for collection in relation to farmers, who, upon the facts in the case were not engaged, either directly or indirectly in interstate or foreign commerce nor affecting the same.

REASON FOR GRANTING THE WRIT

The Court should grant a review on certiorari for the following reasons:

1. A review of this case would decide an important question of federal law which has not been, but should be settled by this court.

2. The Federal Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions by this court.

The Court of Appeals cited *National Lawyer's Guild v. Brownell*, 225 Fed. (2d) 552 C.A.D.C. as authority that the District Court as well as the Circuit Court of Appeals

were deprived of jurisdiction because the defendant failed to exhaust his administrative remedies. This is a mistaken application of the rule of exhaustion of administrative remedies for the following reason:

1. The defendant, Miller, did not bring this action, the United States of America was the moving party.

2. The case cited above by the court was one where the National Lawyer's Guild sought to enjoin the United States Attorney General. The Guild was the moving party who had failed to exhaust its administrative remedies.

If, as the Court of Appeals asserts, the District Court had no jurisdiction, then how was it able to render a judgment against the defendant? Does it have a percentage-wise jurisdiction? Such a thing is in itself preposterous, in that it either has jurisdiction or it does not have jurisdiction.

The United States of America sued the defendant in this case and the question of the constitutionality of the statute was raised in the defendant's answer, page 6a, and 7a, appellant's appendix. It was specifically raised by the defendant's answer.

The defendant, Miller, had no other opportunity in this case to raise a constitutional question until sued by the government and he promptly and fully raised this issue at that time. If the defendant had attempted to raise the question as a moving party, we would have something similar to the case of *Wickard v. Filburn*, 317 U. S. 111.

3. When a penalty is attempted to be imposed and collected from an individual by a governmental agency through court proceedings a defense of unconstitutionality of the particular act under which the penalty is sought may always be raised at such time by the individual. This to the petitioner seems to be basic constitutional law taught to freshman law students and has been adopted by con-

stitutional students since time immemorial. The rule of exhaustion of administrative remedies in such a case has no applicability and is not in point in the case before the court.

The case of *Wickard v. Filburn*, 317 U. S. 111 is cited as authority for the constitutionality of the act as applied to this defendant. This case is not in point and petitioner will set forth the reasons for the inapplicability of that decision to this case.

Wickard v. Filburn as distinguished from *U. S. v. Miller.*

1. In the *Wickard* case the moving party was the farmer. In the *Miller* case it was the government suing to collect a penalty.

2. In the *Wickard* case the farmer sought to enjoin the enforcement of the act to himself. In the *Miller* case the defendant Miller is being sued for a money judgment or penalty by the government for violation, so called, of a federal statute.

3. In the *Wickard* case a stipulated set of facts were agreed upon by the parties. In the *Miller* case, the defendant, Miller, denied essential facts and requested a trial by jury (appellant's appendix, page 8a) which was denied by a granting of a summary judgment under Rule 56 of the Federal Rules of Civil Procedure by the District Court.

4. In the *Wickard* case the farmer sold his wheat (page 114 of opinion). In the *Miller* case the farmer did not sell his wheat nor did not engage in interstate or foreign commerce, directly or indirectly.

5. In the *Wickard* case the farmer also fed to livestock, for sale, etc. In the *Miller* case the defendant did not engage, even indirectly in interstate or foreign commerce.

6. In the *Wickard* case the farmer had accepted benefits under the act previously. In the *Miller* case no benefits were ever accepted, either directly or indirectly by Miller.

Never in the history of this court has the court settled the question involved in this case. In no case where a farmer has been sued for a penalty by the government under the Agricultural Adjustment Act for the raising of wheat and the farmer denies that he is engaged in interstate or foreign commerce and requests a trial by jury has ever been before this court. The *Wickard* case was an injunctive action sought by the farmer and is not in point.

Over 400 farmers in Ohio alone have been sued for penalty by the government. The defendants in many of these cases are factually in the same shoes as Miller. It would benefit both the government and the farmers, for the court to settle the rights of the parties to such a controversy. Much time, money and effort could be saved and justice preserved if the court would settle the rights of the parties to such an action. On the side of the government, if the court saw fit to rule for them, they could cite as a final and settling authority to the question raised in these cases. On the side of the individuals, they could be saved time, money and the effort of employment of counsel with expenses in the filing of briefs, etc., prior to reaching this court.

In the case before the court, we must accept the facts as shown by the pleadings upon which the District Court granted a summary judgment. If under such facts, the government can recover a judgment as an application of the Agricultural Adjustment Act, then the act itself is unconstitutional and this petitioner sincerely believes such. Neither the Court of Appeals or the government has ever cited a case where this court has decided the issues in this case. This alone should be sufficient for a review by this court of the questions involved.

A review of every decision cited in the case of *Wickard v. Filburn* reveals that none are applicable to the case

before this court. Here the defendant raises affirmative defenses and in his answer asserts that he is not engaged either directly or indirectly in interstate commerce and requests a trial by jury. *Wickard v. Filburn* does not decide the issues in this case. It is basic constitutional law that the court, in determining the constitutionality of an act as in *Wickard v. Filburn*, does not go beyond the facts presented to determine the constitutionality of a statute. The facts in *Wickard v. Filburn* case cannot, therefore, be controlling on the petitioner's case as they are not the same.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

ROBERT E. ALBRIGHT,
Attorney for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WALTER J. MILLER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Before: Frank L. Kloeb, Judge.

Order Sustaining Motion for Summary Judgment

(Filed January 19, 1956)

This day this cause was submitted to the court upon the motion of the plaintiff, pursuant to Rule 56 of the Rules of Civil Procedure, for summary judgment in the plaintiff's favor, and upon the briefs of the parties, and upon consideration thereof, the court sustains such motion.

It is, therefore, ordered that judgment be entered for plaintiff in the sum of $302.40, together with the costs of this action.

APPENDIX B.

Opinion

(Decided March 22, 1957.)

Before SIMONS, Chief Judge, ALLEN and STEPHENS,* Circuit Judges.

ALLEN, Circuit Judge. This action was instituted for the purpose of collecting penalties under the Agricultural Adjustment Act of 1938 as amended, 7 U. S. C. Section

*Albert Lee Stephens of the Ninth Circuit.

1281, et seq. On motion of the Government the District Court granted summary judgment against defendant[1] in the amount of $302.40 with costs.

Two principal questions are presented: (1) Whether the action for penalties is quasi-criminal and hence the summary judgment procedure available under Rule 56 of the Federal Rules of Civil Procedure is not available here; (2) whether defendant's failure to apply for his administrative remedies precludes him from challenging the determination of the farm marketing quota and the farm marketing excess, and from raising constitutional questions.

As to the first contention, under Rule 81 (a) (2) the Federal Rules of Civil Procedure are applicable only on appeal where there is a "forfeiture of property for violation of a statute of the United States." Defendant admits in interrogatories that he did not pay the amount of the wheat marketing quota penalty established for his farm, and that he did not deliver any of the wheat grown on the farm to the Secretary of Agriculture as provided in the statute. Defendant claims that, if the judgment is sustained, his property is forfeited or confiscated. In support of his contention that the Federal Rules of Civil Procedure do not apply and that summary judgment was illegally entered, defendant cites *United States* v. *Solomon*, 3 F. R. D. 411, which held that, in an action for penalties arising under the Perishable Agricultural Commodities Act, 7 U. S. C. Section 499a et seq., for carrying on the business of handling perishable commodities without a license from the Secretary of Agriculture, the court would disregard evidence obtained when the Government called defendant for cross-examination as an adverse

[1] Appellant will be called defendant and appellee the Government throughout this opinion.

party under the Federal Rules of Civil Procedure. Both the statute there involved and the factual situation presented are totally different from those of the instant case. The *Solomon* decision has been criticised as unsound in Moors's Federal Practice, 2nd edition, Volume 2, page 12.

The *Solomon* case in turn relies upon *Boyd* v. *United States*, 116 U. S. 616, which declares that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal." The *Boyd* case was decided in 1886, over fifty years before the enactment of the Agricultural Adjustment Act (1938). The statute there provided for a forfeiture for fraudulent importation of goods and authorized compulsory production of defendant's private papers. This provision was held unconstitutional Plainly the decision has no bearing here.

The Agricultural Act provides not for "forfeiture" but for a money judgment for the penalties established for noncompliance. Under the Act a producer's overproduction of wheat contrary to the allotments made by the Secretary of Agriculture and by the County Committee is not invested with a criminal character. It is not a crime to produce in excess of the marketing quota. *Usher* v. *United States*, 146 Fed. (2d) 369, 371 (C. A. 4). In fact, a producer may grow whatever quantity of wheat he wishes, provided he pays the civil penalty. *Usher* v. *United States*, *supra*. Neither is the marketing of wheat in excess of the quota prohibited. The purpose of requiring the penalties was not to raise revenue for the government but to discourage the planting and marketing of more than the quotas established. *Rodgers* v. *United States*, 332 U. S. 371, 374. These circumstances demon-

strate that the action for penalties under the Agricultural Adjustment Act is neither criminal nor quasi-criminal.

In recent years the courts have been reluctant to hold, even in cases of seizure and condemnation of property for violation of statute, that criminal and not civil procedure applies. *Alberty Food Products Company* v. *United States*, 185 Fed. (2d) 321, 326 (C. A. 9), decided that summary judgment may be entered in a case under the Federal Food, Drug, and Cosmetic Act as soon as the property has been seized. Cf. *United States* v. *Five Cases*, 179 Fed. (2d) 519 (C. A. 2). Clearly if the civil summary judgment procedure is available under Rule 56 after property has been seized under a statute providing for forfeiture it should be available here where no seizure or forfeiture is authorized by the Agricultural Adjustment Act and where only money judgment is sought. *Colusa Remedy Company* v. *United States*, 176 Fed. (2d) 554 (C. A. 8), held that a proceeding to forfeit and condemn property for violation of a federal statute which does not involve the personal conviction of the wrongdoes of the offense charged is one of a civil and not a criminal nature. To the same effect see *Dobbins's Distillery* v. *United States*, 96 U. S. 395, 399; *United States* v. *935 Cases More or Less*, 136 Fed. (2d) 523, 526, (C. A. 6). On the assumption that there was no genuine issue of a material fact, the court did not err in rendering summary judgment.

Defendant claims that genuine and material issues of fact were raised by interrogatories as to the establishment and validity of the farm marketing quota and of the farm marketing excess of wheat for defendant's farm, that these interrogatories were not answered and that the summary judgment must therefore be reversed.

Defendant failed to apply for, much less exhaust, his administrative remedies. Hence, he cannot raise these questions here. He could have asked the Secretary for a downward adjustment in the amount of the farm market excess. 7 U. S. C. Section 1340(12). He could have applied to have the farm marketing quota reviewed by a local review committee. Section 1363. He could have filed a bill in equity in the United States District Court or could have instituted proceedings for review in a state court of record. Section 1365. The statute specifically provides that, unless application for review is made within the time limited, the original determination of the farm marketing quota shall be final. 7 U. S. C. Section 1367 provides that the determination of the committee is exclusive and that, except under the statute, no court of the United States shall have jurisdiction to pass upon the legal validity of any such determination.

The farm marketing quota is necessarily based upon the determination of the farm marketing excess; hence, the validity of the County Committee's determination of the quota depends upon its determination of the farm marketing excess. This decision is compelled by the history of the legislation. The Act of May 26, 1949, 55 Stat. 203, 7 U. S. C. Section 1340, amended the statute to provide specifically for the determination of the farm marketing excess by the County Committee. As declared by the United States Supreme Court in *Markham* v. *Cabell*, 326 U. S. 404, 411, "the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole." It follows that the Congress intended that the administrative review provisions of the Act which were retained by subsequent amendment, 65 Stat. 31, 7 U. S. C. Section 1363, should be

enforced for the determination of the farm marketing excess. Moreover, the regulation [19 F. R. 205, Section 728.465(a)] issued by the secretary under authority of the statute expressly provides that the determination of the administrative officials shall be final, both as to the quota and as to the farm marketing excess unless application for review is made. Since this regulation is in conformity to the statute it has the force and effect of law.

It is unnecessary to cite the countless decisions with reference to the rule of exhaustion of administrative remedies and its application to the finality of determination. The doctrine applies to a remedy provided by regulation as well as by statute. *National Lawyers' Guild* v. *Brownell*, 225 Fed. (2d) 552 (C. A. D. C.). The District Court and this court are deprived of jurisdiction by defendant's faliure to seek review. 7 U. S. C. Section 1367. Moreover, defendant's inaction precludes him from raising his constitutional questions, for these questions clearly bear upon the "legal validity" of the determinations. 7 U. S. C. Section 1367. If defendant were enabled to assert the extensive constitutional points which he raises, we think many of them have in effect been disposed of by the Supreme Court in *Wickard* v. *Filburn*, 317 U. S. 111, cited and approved in *Maneja* v. *Waialua Agricultural Company, Ltd.*, 349 U. S. 254, 259. In light of these decisions, as to the constitutional questions defendant's remedy, if any, may be legislative rather than judicial.

The judgment of the District Court is affirmed.